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Issue date: 21Dec2001

Case Number: 2000-JTP-00006

IN THE MATTER

COMMONWEALTH OF PUERTO RICO
Complainant

v.

U.S. DEPARTMENT OF LABOR
Respondent

Steven D. Cundra, Esq.
Washington, DC
and
Kelly A. McCloskey, Esq.
Chicago, IL
For the Complainant

Frank P. Buckley, Esq.
Washington, DC
For the Respondent

Before: JEFFREY TURECK
Administrative Law Judge

DECISION AND ORDER

This is an appeal from a *Revised Final Determination* disallowing $732,232 in on-the-job training costs under the Job Training Partnership Act, 29 U.S.C. 1501 *et seq*. ("JTPA" or "the Act"). A formal hearing was held in San Juan, Puerto Rico from February 12-14, 2001.

The complainant contends that the Grant Officer's disallowance of $731,232 in on-the-job training ("OJT") costs was contrary to the JTPA and without merit. The Grant Officer argues that these costs were properly disallowed because they were unreasonable and not in accord with the JTPA or the applicable regulations. Having reviewed all of the testamentary and documentary evidence and carefully considered the parties' arguments, I hold that the Grant Officer's disallowance of the OJT costs has no basis factually or statutorily.

As a preliminary matter, a few days prior to the hearing the complainant filed a *Motion for Judgment on Partial Findings* in which it argued that, under 20 C.F.R. §636.10(g) and *Texas Department of Commerce v. U.S. Department of Labor*, 137 F.3d 329 (5th Cir. 1998), DOL has the initial burden of persuasion in supporting its disallowance of expenditures under a JTPA grant, and must establish a prima facie case solely through its submission of the Administrative File. Complainant further contended that the Grant Officer failed to meet this burden, and that the case should be dismissed. I deferred ruling on this motion at the hearing because the Grant Officer did not have adequate time to respond to it. The Grant Officer did file a response subsequent to the hearing in which it was contended that §636.10(g) does not dictate that the Grant Officer rely solely on the Administrative File to meet his burden of production. Rather, the Grant Officer argued that he can supplement the contents of the Administrative File with documentary and testimonial evidence. The Grant Officer also alleged that he does not have to identify the statutory and regulatory basis for his disallowance of costs, but that in any event he did so.

The issues raised in complainant's motion are significant, and deserve a response. However, since I have heard the case and hold that complainant has prevailed on the merits, it makes little sense for me to decide the case based on a procedural ruling. Therefore, I will not further address complainant's *Motion for Judgment on Partial Findings* in this decision.

FINDINGS OF FACT AND CONCLUSIONS OF LAW[1]

a. Background

The Commonwealth of Puerto Rico's Department of Labor and Human Resources ("DLHR")

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[1] Citations to the record of this proceeding will be abbreviated as follows: AF – DOL's Administrative File; GOX – Grant Officer Exhibit; DLHRX – Puerto Rico Department of Labor and Human Resources Exhibit; JX – Joint Exhibit; TR – Hearing Transcript. It should be pointed out that when I began drafting my decision in this case, I noticed so many errors in the hearing transcript that it was returned to the reporting company to be retranscribed. Since the parties had already filed briefs with reference to the initial transcript, they were ordered to revise the briefs with citations to the new transcript. This process delayed the issuance of this decision by several months.

was awarded a grant totaling $14,209,345 under Grant No. 99-1-0338-56-321-02 for the period July 1, 1991 to June 30, 1995 under the JTPA's Migrant and Seasonal Farmworker Program. Under the grant, DLHR was to provide job training and employment opportunity to youths and unskilled, economically disadvantaged adults.

DOL's Office of the Inspector General ("OIG") conducted a financial and performance audit of DLHR's Migrant and Seasonal Farmworker Program for the period July 1, 1991 to March 31, 1995, which covered all but the last three months of the grant period. Field work for the audit was conducted at DLHR's central office in Hato Rey, Puerto Rico, and in other locations in Puerto Rico, from May 15 to August 3, 1995 (AF-90). OIG came up with tentative findings, which were provided to DLHR in October 1995, challenging $1,416,240 of the costs allocated by DLHR for OJT, stating that these expenditures were "of virtually no value to [participants] ...." (AF 74, 85, 113). It was the OIG's contention that these expenditures were for "simple ordinary farm tasks" which "would not lead to improved employment." (AF 116-17). In its response to these tentative findings, DLHR pointed out that the OJT outlines did not detail everything that went into the training, but that seemingly simple tasks were actually composed of more complicated and specialized tasks (AF 147-48). DLHR also noted its OJT participants had placement rates between 58% and 66% from 1991 to 1994, exceeding DOL's performance standards. The audit report, dated February 27, 1996 (AF 69 *et seq*.), found DLHR's comments unavailing, and reaffirmed the disallowance of OJT costs. The issuance of the final audit reported brought notoriety to DLHR's farmworkers program through the national media, including mention in NBC's national news, in its "Fleecing of America" segment (TR 13, 262).

In response to the initial audit, DOL sent an Employment and Training Administration Response Team to Puerto Rico in late January, 1996. Accordingly to Daniel Trementozzi, a member of the Response Team, the unannounced intention of the review team was to find a replacement grantee for Puerto Rico (TR 438-40). However, what the Response Team found was that DLHR's farmworker OJT program, far from providing worthless training at exorbitant cost, was providing valuable training in specialized agricultural areas at reasonable cost per placement (DLHRX 14, at 2-6; DLHRX 10, at 72-74). The Response Team set out its findings in a report dated February 22, 1996. Although written five days before the OIG's final audit report was issued, there is no reference to the Response Team's findings in the final audit report.

On July 8, 1996, the Grant Officer (at that time Linda Kontnier) issued her *Initial Determination*, which reaffirmed the audit report's disallowance of $1,764,658 (AF 50-56). Of this amount, $1,416,240 were costs for OJT. The *Initial Determination* essentially parroted the audit report's finding that the OJT was valueless, consisting of menial tasks which would not enhance the participants' employability. Again, no reference was made to the Response Team's contrary findings.

In response to the *Initial Determination*, DLHR sent the Grant Officer hundreds of questionnaires filled out by approximately 90% of the Migrant and Seasonal Farmworker Program

participants attesting to the training they received (DLHRX 33). Further, DLHR stated that almost 70% of the participants who completed job training under the grant were employed after their training (DLHRX 8, at p.2). However, the Grant Officer found this documentation inadequate to determine that the participants received meaningful training, and in her January 9, 1997 *Final Determination* again disallowed all of the previously disallowed OJT costs. But the Grant Officer corrected a $14,280 mathematical error, which reduced the disallowed costs to $1,401,960 (AF 43). Once again, no mention was made of the Response Team's report.

DLHR appealed the *Final Determination* (TR 194, 252), prompting a meeting between Linda Kontnier; a representative from the Solicitor's Office; Ed Tomcheck, the head of the Office of Grants and Contract Management; and Jaime Salgado, who eventually became the Grant Officer for this case. Diane Edwards, who was now the Grant Officer for this grant (TR 113), probably was at the meeting as well (TR 250). At that meeting, it was decided to withdraw the *Final Determination*; "it was felt that the disallowance [of OJT costs] based on program performance would be very hard to sustain." (TR 251-53). Accordingly, the new Grant Officer, Diane Edwards, withdrew the *Final Determination* (TR 113).

The Grant Officer then instructed Mollie Harris, the audit resolution specialist who had prepared the previous determinations for the former Grant Officer, to "try a different approach." (TR 194); and on December 23, 1998, a *Revised Initial Determination* was issued by Ms. Edwards (AF 30-36). In this *Revised Initial Determination* the Grant Officer stated:

> In a sampling of the Grantee's OJT Contracts, the Grant Officer found that the grantee paid $731,232 for training hours in excess of the time required by the Dictionary of Occupational Title [*sic*] (DOT) to impart such training to program participants.

(AF 32). The Grant Officer went on to state that:

> [W]e do, however, question whether the trainees received skills that have enabled them to obtain upward mobility.

(*Id.*). The Grant Officer then disallowed $731,232 in OJT expenditures. According to Ms. Harris, the disallowed costs were those for training which exceeded the *Dictionary Occupational Titles*' ("*DOT*") Specific Vocational Preparation for jobs listed in DLHR's training plans which were identified in the *DOT* with occupational codes for which the middle three digits were "687" (TR 116).[2]

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[2]Since *DOT* occupational codes are at the heart of this case, a detailed explanation of these codes is appropriate. The following is excerpted from the *DOT* at xviii-xix (4th ed. 1991), with minor changes which will not be noted and with the references to specific *DOT* occupational codes changed

to codes relevant to this case:

Occupational codes in the *DOT* contain nine digits, for example, 407.687-010. Each set of three digits in the 9-digit code number has a specific purpose or meaning. Together, they provide a unique identification code for a particular occupation which differentiates it from all others.

The first *three digits* identify a particular occupational group. All occupations are clustered into one of nine broad "categories" (first digit), such as professional, technical and managerial, or agricultural, fishery, forestry and related occupations. These categories break down into 83 occupationally specific "divisions" (the first two digits), such as occupations in architecture and engineering within the professional category, or plant farming and animal farming in the agricultural, fishery, forestry and related occupations category. Divisions, in turn, are divided into small, homogeneous "groups" (the first three digits) - 564 such groups are identified in the DOT. The nine primary occupational categories are listed below:

0/1	Professional, Technical, and Managerial Occupations
2	Clerical and Sales Occupations
3	Service Occupations
4	Agricultural, Fishery, Forestry, and Related Occupations
5	Processing Occupations
6	Machine Trades Occupations
7	Benchwork Occupations
8	Structural Work Occupations
9	Miscellaneous Occupations

In the example, the first digit (4) indicates that this particular occupation is found in the category, “Agricultural, Fishery, Forestry and Related Occupations.”

The second digit refers to a division within the category. The divisions within the "Agricultural, Fishery, Forestry and Related Occupations" category are as follows:

40	Plant Farming
41	Animal Farming
42	Miscellaneous Agricultural and Related Occupations
44	Fishery and Related Occupations
45	Forestry Occupations
46	Hunting, Trapping, and Related Occupations

Some divisions or groups end in the designation "n.e.c." (not elsewhere classified). This indicates

that the occupations do not logically fit into precisely defined divisions or groups, or that they could fit into two or more of them equally well.

In the example, the second digit (0) locates the occupation in the "Plant Farming" division.

The third digit defines the occupational group within the division. The groups within the "Plant Farming" division are as follows:

401 Grain Farming Occupations
402 Vegetable Farming Occupations
403 Fruit and Nut Farming Occupations
404 Field Crop Farming Occupations, N.E.C.
405 Horticultural Specialty Occupations
406 Gardening and Groundskeeping Occupations
407 Diversified Crop Farming Occupations
408 Plant Life and Related Service Occupations
409 Plant Farming and Related Occupations, N.E.C.

In the example, the third digit (7) locates the occupation in the "Diversified Crop Farming Occupations" group.

The *middle three digits* of the DOT occupational code are the Worker Functions ratings of the tasks performed in the occupation. Every job requires a worker to function to some degree in relation to data, people, and things. A separate digit expresses the worker's relationship to each of these three groups:

DATA (4th Digit)	PEOPLE (5th Digit)	THINGS (6th Digit)
0 Synthesizing	0 Mentoring	0 Setting Up
1 Coordinating	1 Negotiating	I Precision Working
2 Analyzing	2 Instructing	2 Operating-Controlling
3 Compiling	3 Supervising	3 Driving-Operating
4 Computing	4 Diverting	4 Manipulating
5 Copying	5 Persuading	5 Tending
6 Comparing	6 Speaking-Signalling	6 Feeding-Offbearing
	7 Serving	7 Handling
	8 Taking Instructions-Helping	

As a general rule, Worker Functions involving more complex responsibility and judgment are

The Specific Vocational Preparation is "the amount of lapsed time required by *a typical worker* to learn the techniques, acquire the information, and develop the facility needed for average performance in a specific job-worker situation." *DOT* at 1009 (4th ed. 1991) (emphasis added). It is broken down into nine levels, from Level 1 – a short demonstration, to Level 9 – over 10 years. The Specific Vocational Preparation for the jobs at issue, for which "687" was the middle three digits of the *DOT* occupational codes, is Level 2 – up to one month, which Ms. Harris translated as 30 work days (*e.g.*, TR 150). Costs for any training these participants received in excess of 30 days were disallowed.

ETA had never previously based a disallowance of costs for a grant on the *DOT* (TR 196, 311), and it has not done so in any subsequent cases (TR 311). The JTPA had been amended effective July 1, 1993 by the inclusion of a new section, §141(g)(2), which in addition to limiting OJT to no more than six months, included the following provision:

In determining the period generally required for acquisition of the skills [needed for the

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assigned lower numbers in these three lists while functions which are less complicated have higher numbers. For example, "synthesizing" and "coordinating" data are more complex tasks than "copying" data; "instructing" people involves a broader responsibility than "taking instructions-helping"; and operating" things is a more complicated task than "handling" things.

The Worker Functions code in the example (687) relates to the middle three digits of the DOT occupational code and has a different meaning and no connection with group code 407 (first three digits).

The Worker Functions code (687) may be found in any occupational group. It signifies that the worker is "comparing" (6) in relation to data; "taking instructions-helping" (8) in relation to people; and "handling" (7) in relation to things. The Worker Functions code indicates the broadest level of responsibility or judgment required in relation to data, people, or things. It is assumed that, if the job requires it, the worker can generally perform any higher numbered function listed in each of the three categories.

The *last three digits* of the occupational code number serve to differentiate a particular occupation from all others. A number of occupations may have the same **first** six digits, but no two can have the same nine digits. If a 6-digit code is applicable to only one occupational title, the final three digits assigned are always 010 (as in the example). If there is more than one occupation with the same first six digits, the final three digits are usually assigned in alphabetical order of titles in multiples of four (010, 014, 018, 022, etc.). The full nine digits thus provide each occupation with a unique code suitable for computerized operations.

> position], consideration shall be given to recognized reference material (such as the Dictionary of Occupational Titles), the content of the training of the participant, the prior work experience of the participant, and the service strategy of the participant.

But §141(g)(2) was not mentioned in the *Revised Initial Determination*. In its March 19, 1999 response to the *Revised Initial Determination* (CX 24), DLHR challenged the Grant Officer's reliance on the *DOT* to disallow the OJT costs, contending among other than things neither the JTPA nor the regulations make the DOT Specific Vocational Preparation listings determinative of the duration of training under OJT grants. A supplemental response to the *Revised Initial Determination* was filed on March 13, 2000 (CX 10). DLHR pointed out that the training received by its OJT participants was more complex than the Grant Officer indicated in the *Revised Initial Determination*, and attached the Quick Response Team's report and other evidence to support its position.

Shortly after the *Revised Initial Determination* was issued, Diane Edwards retired. She was replaced as the Grant Officer by Jaime Salgado, the Chief of the Division of Resolution and Appeals (TR 240). On May 17, 2000, Mr. Salgado issued a *Revised Final Determination* affirming the disallowance of $731,232. Although acknowledging DLHR's contention that there was no statutory or regulatory basis for disallowing OJT costs based on the *DOT*, the Grant Officer, citing only a single regulation (20 C.F.R. §653.103) promulgated under a different statute, stated that it was proper to rely on the *DOT* occupational codes listed on the OJT training outlines.

b. Discussion

1. Grant Officer's failure to make a prima facie case

Under the JTPA as enacted in 1982, there was no specified limit for the duration of OJT. The amendment to the JTPA referred to above – §141(g)(2) – which became effective on July 1, 1993, imposed a six month time limit. None of the OJT for which costs have been disallowed in this case exceeded six months. Accordingly, DLHR did not violate any explicit time limits through the challenged OJT, and none of the Grant Officers have contended that any explicit statutory or regulatory time limit was violated. What is so troubling is that the Grant Officers fundamentally changed their contentions regarding the nature of any alleged violations and the sections of the statute and regulations which DLHR allegedly violated in regard to its OJT program.

In the initial and final determinations, $1,416,240 in OJT costs were disallowed under §141(g)(1) of the JTPA and §633.301(b)(2) of the regulations. Section 633.301(b)(2) states:

> [A grantee shall be responsible for:] Designing program activities which will, to the maximum extent feasible, contribute to the occupational development and upward mobility of every participant.

The Grant Officer found that the training being given to OJT program participants was ineffectual and of insufficient value to lead to upward mobility. This was the same position taken by the grant auditors. This position was abandoned following DLHR's filing of an appeal of the *Final Determination*, because "it was felt that the disallowance based on program performance would be very hard to sustain." (TR 253).

Despite the withdrawal of the initial and final determinations because the Division of Resolution Appeals did not believe it could prove that the OJT was ineffectual, the *Revised Initial Determination* echoed the withdrawn determinations by again citing §141(g)(1) of the JTPA and §633.301(b)(2) of the regulations and stating that much of the OJT would not lead to upward mobility and had little value. However, without claiming any additional statutory or regulatory support, the December 23, 1998 *Revised Initial Determination*, for the first time in the entire course of this case from the auditor's tentative findings in October, 1995 through the initial and final determinations, mentioned that some of the OJT training was "in excess of the time required by the Dictionary of Occupational Title [*sic*] (DOT) to impart such training to program participants." (AF 32).

In the *Revised Final Determination*, the only remaining contention supporting the disallowance of $731,232 in OJT costs was that the duration of OJT training exceeded the *DOT*. Further, the only regulation cited to support the finding was 20 C.F.R. §653.103. Although subsection (d) of §653.103 references the *DOT*, 20 C.F.R. Part 653 was promulgated under the Wagner-Peyser Act, not the JTPA, and has absolutely nothing to do with duration of training or OJT contracts.[3] Section 141(g)(2)

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[3] Twenty C.F.R. §653.103 states in pertinent part:

> (d) If the MSFW [migrant and seasonal farmworker] wishes to complete a full [job] application, the staff shall provide all assistance necessary to complete the application and shall ensure that the form includes complete information. It shall include, to the extent possible, the significant history of the MSFW's prior employment, training and educational background and a statement of any desired employment and any training needs in order to permit a thorough assessment of the applicant's skills, abilities and preferences. All applicable items shall be completed according to the ETA instructions for preparation of the application card (ES-511). Additional Dictionary of Occupational Titles codes or keywords shall be assigned, where appropriate, based on the MSFW's work history, training, and skills, knowledge, and abilities. Secondary cards shall be completed and separately filed when keywords are not used. In extremely small local offices where the limited applicant load and file size does not require completion of secondary cards, additional D.O.T. codes shall be noted on the primary application card.

of the JTPA, which is concerned with duration of training and also mentions the *DOT*, was not cited. The Grant Officer admitted that §653.103 was the only regulation cited in the *Revised Final Determination* and that it was unrelated to OJT contracts in general and duration of training in particular (TR 283-84).

Finally, at the hearing, the Grant Officer stated for the first time that 20 C.F.R. §633.303(a) was the sole statutory or regulatory basis for his disallowance of the OJT costs in the *Revised Final Determination* (TR 273). That section of the regulations states:

> To be allowable, a cost must be necessary and reasonable for proper and efficient administration of the program, be allowable thereto under these principles, and, except as specifically provided herein, not be a general expense required to carry out the overall responsibilities of the recipient.

According to the Grant Officer, OJT in excess of the Specific Vocational Preparation is not "necessary and reasonable for proper and efficient administration of the program ...," and therefore costs associated with that training must be disallowed (TR 273). But DOL had not cited §633.303(a) as the basis of its disallowance of DLHR's OJT expenditures at any time prior to the hearing. That section of the regulations is not cited in the any of the four determinations issued by the several Grant Officers; nor was it cited in Mr. Salgado's deposition testimony or in DOL's responses to DLHR's interrogatories (*e.g.*, TR 286-90).

What is apparent from this frequent changing of positions is that ETA had no established policy of applying the *DOT* to determine allowable limits on the duration of training under JTPA. In fact, the *DOT* had never been used for compliance purposes under the Migrant and Seasonal Farmworker Program (TR 446, 448). Rather, the concept of applying the *DOT* to determine allowable limits on the duration of OJT was developed by ETA during the pendency of this case following the withdrawal of the initial and final determinations with little or no understanding of the *DOT* in general and the Specific Vocational Preparation for occupational codes in particular, and was then applied retroactively to DLHR.

At the least, the changes in the Grant Officers' positions show the arbitrariness of their determinations in disallowing these OJT costs as excessive. At worst, by retroactively applying a newly created theory of cost disallowance against DLHR and not informing DLHR of the legal basis for that theory until the second day of the hearing, DLHR has been denied due process.[4]

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[4] Although it may seem cynical, one cannot help but get the impression that, following its embarrassing retraction of the initial and final determinations, the Grant Officer was intent on finding some violation on which to base a disallowance of DLHR's OJT expenditures.

Mollie Harris's testimony clearly illustrates that the theory under which the Grant Officer disallowed DLHR's OJT costs as excessive was created years after the grant period and without a reasoned legal basis. Ms. Harris was the audit resolution specialist for each of the four determinations which were prepared in this case (TR 103, 107, 113, 194, 388). She is the one constant in ETA's audit of DLHR's grant. Ms. Harris is a well-meaning, conscientious, long-time DOL employee who tried to make the best of a very difficult assignment. Moreover, she was a very credible witness. She prepared the *Initial Determination* in reliance on the findings in the audit report, and accordingly disallowed $1,416,240 in OJT expenditures as ineffectual. In response to this *Initial Determination*, DLHR filed, *inter alia*, almost a thousand affidavits from its OJT participants attesting to the training they received (TR 107). After reviewing these affidavits, Ms. Harris believed DLHR had shown that the participants received reasonable training, but she was overruled by the Grant Officer at that time, Diane Kontnier, leading to the issuance of the *Final Determination* which continued to disallow the OJT expenditures (TR 109-12).

After the *Initial Determination* and *Final Determination* were withdrawn, the Grant Officer at that time, Diane Edwards, told Ms. Harris to take a different approach in reviewing the program (TR 194). So Ms. Harris reviewed the auditor's work papers (TR 113). For reasons that are virtually unexplained in the record, Ms. Harris focused on the *DOT* and its Specific Vocational Preparation determinations. What makes her focus on the Specific Vocational Preparation really bizarre is that Ms. Harris knew virtually nothing about the *DOT*. She had not previously used the *DOT*, had little knowledge or understanding of its contents, and did not know anything about the Specific Vocational Preparations (TR 115, 160-64, 197-98). Moreover, she had no idea why the *DOT* occupational codes were listed on the OJT training outlines and never tried to find out (TR 158, 167). She also completely misunderstood the information on the training outlines, where the *DOT* occupational codes were listed (TR 158-60). Further, since the jobs which had "687" as the middle three digits in their *DOT* occupational codes had various periods of training, it occurred to her, consistent with DLHR's contentions (*see* TR 223), that DLHR was not using the "687" designation to establish the duration of training (TR 172-73). Also, the audit report never mentioned the *DOT* (TR 196). Finally, it was her erroneous belief that the tasks listed on the training outlines described elements of the *DOT* occupational codes rather than the specific tasks for which the participants were to receive training (TR 215).

In addition to these factual discrepancies, Ms. Harris was operating under misconceptions regarding the law. She erroneously believed that the requirement in 20 C.F.R. §653.103 that *DOT* occupational codes be placed on Migrant and Seasonal Farmworker applications with the Job Service also applied to OJT contracts under the JTPA, and that these occupational codes set an absolute limit on the duration of training (TR 144-45). That was her entire basis for stating in the *Revised Initial Determination* that the *DOT* set a limit on duration of training (TR 157). She also believed that the six-month limit on duration of OJT training contained in §141(g)(2) of the JPTA applied to all of the

OJT at issue despite the fact that §141(g)(2), an amendment to the JTPA, was not effective until July 1, 1993 and the OJT contracts under this grant go back to July 1, 1991 (TR 145-47).[5]

Ms. Harris also testified that she relied on 20 C.F.R. §627.240(a)(4)(ii) (*see* AF 416) in making her recommendations to the Grant Officers. Section 627.240(a)(4)(ii) states:

> In determining the average training time, consideration should be given to recognized reference materials, such as the "Dictionary of Occupational Titles" (DOT) and employer training plans. Such materials need not be limited to the DOT, however.

There are numerous problems with Ms. Harris's reliance on this subsection of the regulations to limit duration of training under DLHR's grant. For one thing, §627.240(a)(4) is concerned with determining "average training duration for occupations," not the maximum duration of training. Second, contrary to her belief that this section of the regulations applied to the grant period (TR 151-52), it did not become effective until June 30, 1995 (*see* 59 FR 45760), which was subsequent to the period covered by the audit. Third, Part 627 of the regulations does not apply to Title IV of the JTPA, under which the Migrant and Seasonal Farmworker Program arises.

All of these misconceptions, as well as the Grant Officer's instruction to take a different approach in revising the withdrawn determinations, led Ms. Harris to disallow DLHR's costs for training exceeding the *DOT* Specific Vocational Preparation period of one month for jobs in which the occupational codes listed on the training outlines had "687" as the middle three digits.

Jaime Salgado became the Grant Officer for this grant in January, 1999 (TR 256), shortly after the *Revised Initial Determination* had been issued. Mr. Salgado is the Division Chief for the Division of Resolution and Appeals (TR 240). As with Ms. Harris, Mr. Salgado was a credible witness, and he appears to be a man of great integrity. But also as with Ms. Harris, his testimony of how he came to disallow the OJT costs is unsettling. Mr. Salgado stated that, as a Grant Officer, his personal standard is to allow all costs which ETA does not have sufficient information to disallow (TR 323-24). He also stated that Ms. Edwards was the only Grant Officer to use *DOT* occupational codes to disallow OJT costs (TR 311). Further, he admitted that there is no provision under the JTPA that the duration of OJT cannot exceed the *DOT* Specific Vocational Preparation listings (TR 308-09, 336-37), and that the *Revised Final Determination* did not disallow OJT costs due to a lack of documentation but rather simply for exceeding the Specific Vocational Preparation listings (TR 308). What is more, he acknowledged that neither he nor Ms. Harris personally reviewed DLHR's OJT training outlines, and that perhaps no one at DOL looked at them even though the training outlines were in his office (TR

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[5] The transcript of the hearing at p.146 incorrectly states Section 141(*d*) rather than (*g*). This is clearly a transcription error since §141(d) was not amended in 1992 and has nothing to do with the duration of OJT.

323-23). Mr. Salgado also acknowledged that the Specific Vocational Preparations were the sole basis for his determination that the duration of OJT in this case was excessive (TR 330; *cf*. TR 340). In addition, Mr. Salgado admitted that he does not know why *DOT* occupational codes were put on the training outlines although he believes it was not to limit duration of training (TR 379-80); yet he never thought of asking DLHR why the *DOT* occupational codes were on the training outlines (TR 381). Finally, and most troubling, Mr. Salgado cites only one section of the regulations as supporting the disallowance of the OJT costs in this case, §633.303(a), and admits that the first time that regulation was cited to support the disallowance of OJT costs in regard to this grant was at the hearing on February 13, 2001.[6]

As this discussion establishes, DOL failed to articulate even a colorable rationale, either legally or factually, to support its disallowance of DLHR's OJT costs. The Grant Officer's position, when stripped of all excess verbiage, is that any on-the-job training which exceeded the Specific Vocational Preparation for the *DOT* occupational code listed on a participant's training outline is not allowable, *i.e*., it is a *per se* violation of the JTPA and its derivative regulations. Accordingly, all OJT for the "687" jobs which exceeded the Specific Vocational Preparation of one month was disallowed. But there is no evidence in the record that the OJT was excessive or unreasonably long. The Grant Officer has not pointed to any provision in the JTPA or the regulations, or to any case law or official DOL publication, which provides a basis for his position. In fact, as was previously noted, this appears to be the only case in which this theory has ever been advanced. Since there is no factual evidence which could have led to a conclusion that the duration of the OJT for the "687" jobs was unnecessary or unreasonable; the OJT did not exceed the statutory maximum of six months; and there is no statutory or regulatory authority that the duration of OJT cannot exceed the Specific Vocational Preparation for that job in the *DOT*; DOL has not made a prima facie case that OJT in excess of 30 days was not allowable. Therefore, the Grant Officer's determination to disallow $732,232 in costs for OJT in excess of 30 days is reversed.

2. Reliance on the DOT in setting standards for compliance under the JTPA is improper

Not only do the JTPA and its derivative regulations fail to provide a basis for the Grant Officer

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[6]Section 636.8(a) of the regulations governing adjudications under Title IV of the Act states that an initial determination "shall be based upon the requirements of the Act, regulations, grants or other agreements ...;" §636.8(b) requires an initial determination to "[s]tate the basis of the determination, including factual findings and conclusions ...." Taken together, these two provisions doubtless require an initial determination to provide notice of the statutory and regulatory basis of a disallowance of costs. By failing to notify DLHR in the *Revised Initial Determination* that the legal basis for disallowance of OJT costs was §633.303(a), ETA violated its own regulations. Whether this violation constitutes a legally sufficient basis, by itself, to reverse the Grant Officer's disallowance of OJT costs, although a compelling issue, will not be pursued because it is superfluous.

to rely on the *DOT* Specific Vocational Preparation listings to determine that the OJT in excess of 30 days was excessive, but there are several reasons why the DOT in general and the Specific Vocational Preparation listings in particular are not suitable for setting standards for duration of training. The Grant Officer's reliance on the *DOT* to determine that OJT in excess of 30 days was subject to disallowance under the JTPA was therefore improper. These will be discussed below.

(a) The DOT is not intended to be used to set mandatory standards

The *DOT* cautions against using its data to set bright-line standards:

> In preparing occupational definitions, no data were collected concerning these and related matters. Therefore, the occupational information in this edition cannot be regarded as determining standards for any aspect of the employer-employee relationship. Data contained in this publication should not be considered a judicial or legislative standard for wages, hours, or other contractual or bargaining elements.

DOT at xiii (DLHRX 11). Apparently in recognition of this limitation, where the Act and the regulations mention the *DOT* it is to cite it as a reference; nowhere are its data considered to set mandatory requirements. *See* §141(g)(2) of the Act; 20 C.F.R. §§627.240. Moreover, in ETA's April 17, 1998 Memorandum No. 98-4 addressed to "All Section 402 Grantees" and entitled "OJT Guidance Points," it is stated that "[t]he Specific Vocational Preparation (SVP) levels provide *generic guidance* in establishing the maximum number of training hours." (CX 31 at 3) (emphasis added). It is clear that the *DOT* Specific Vocational Preparation listings are not intended to be used as legal standards, and neither the JTPA nor the regulations promulgated under it have used them as legal standards. Accordingly, that DLHR's OJT may have exceeded the Specific Vocational Preparation period is not a basis to determine that the duration of training was excessive and therefore not allowable.

(b) The DOT may not contain occupational codes for the jobs in which the participants were receiving training

Even assuming that the Specific Vocational Preparations could serve as presumptive evidence of the maximum allowable duration of OJT, the Grant Officer's theory requires a finding that the *DOT* occupational codes listed on the training outlines accurately described the jobs for which the participants were being trained. For if those jobs do not fall squarely into the assigned occupational codes, then the Specific Vocational Preparations would not be apposite. The *Special Notice* in the prefix to the *DOT* again cautions about placing too much reliance on its contents:

> Occupational information contained in the revised fourth edition DOT reflects jobs as they have been found to occur, but they may not coincide in every respect with the content of the jobs as performed in particular establishments or at certain localities.

> DOT users demanding specific job requirements should supplement this data with local information detailing jobs within their community.

DOT at xiii (DLHRX 11). The Grant Officer made no effort to compare the jobs in which the participants were being trained with the descriptions of those jobs in the *DOT*; rather, the Grant Officer appears to be treating the occupational codes listed on the training outlines as admissions by DLHR that those codes accurately described the jobs for which training was being provided. However, the testimony of the Director of DLHR's Migrant and Seasonal Farmworker Program, Ramades Lamenza, indicated that this is not the case. Mr. Lamenza stated that in determining which *DOT* occupational code to use for any particular job, his staff is instructed to

> look at this reference source [the *DOT*] and find an occupation that is as similar as possible to the real occupation that they're going to be trained at, and to use that DOT code for purposes of identification. And although the DOT is a very good reference, very good reference material, it does not always – all the jobs are not in there.
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> ....
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> ... [W]e look at the different occupational titles and read the definitions and try and select a definition that fits best the training outline that has been developed by the employer and our specialist.

TR 518-19. It should be pointed out that *DOT* occupational codes were placed on the training outlines for two purposes, neither of which has any relation to duration of training. First, it is a means for DLHR to keep track of the kinds of occupations for which it provides training, as DLHR provides training in over a hundred different occupations (TR 642-43; CX 35). Second, the use of *DOT* occupational codes is required for the Standardized Program Information Reports, a Federal pilot program for data gathering of which Puerto Rico's Migrant and Seasonal Farmworker Program is a part, as well as for the Management Information System (TR 446-47, 498-99). As both Ms. Harris and Mr. Salgado realized, DLHR did not use the occupational codes to determine the duration of its OJT. Moreover, consistent with Mr. Lamenza's testimony that not all jobs are listed in the *DOT*, the *DOT* does not have any occupational codes specifically directed to growing tropical fruit and/or coffee, the crops with which most of the training outlines are concerned, and the Grant Officer provided no evidence that any of the occupational codes listed in the *DOT* can be applied to such crops. This is vital, since different crops have different occupational codes and job descriptions, as well as different divisions of labor between "663" and "683" jobs with Specific Vocational Preparations of Levels 4 or 5 and the "687" jobs with Specific Vocational Preparations of Level 2 (*compare* 402.663-010 and 402.687-010 for vegetable farming *with* 403.683-010 and 403.687-010 for fruit farming and *with* 404.663-010 and 404.687-010 for field crops). Therefore, it cannot be assumed that any of the existing occupational codes with their Specific Vocational Preparations can be imputed to growing coffee and tropical fruit.

> Moreover, even assuming that growing coffee and tropical fruit would fit within existing

occupational codes, the training outlines in evidence show that many of the jobs in which the participants were being trained had elements of both Farmworker I jobs, for which the Specific Vocational Preparation is Level 4 – over three months up to and including six months – and Farmworker II jobs, for which the Specific Vocational Preparation is Level 2 – up to and including one month. For example, the three participants receiving their OJT at the farm of Miguel Rivera Colon were listed under occupational code 407.687-010 – Farmworker Diversified Crops II, for which the Specific Vocational Preparation is Level 2. But included in their job duties were fumigating with herbicides and using agricultural machinery, both of which fall within the job description for Occupational Code 407.663-010 – Farmworker Diversified Crops I, for which the Specific Vocational Preparation is Level 4. *See* AF 558-62. *See also, e.g.*, AF 682, 734. Also, as the Response Team pointed out, many of the participants received training in addition to the tasks listed on the training outlines (DLHRX 13, at 6). Accordingly, even if it was permissible for DOL to disallow OJT expenditures where the training exceeds the *DOT* Specific Vocational Preparation for occupations listed in the *DOT*, it would not be appropriate to do so here because the evidence establishes that, through no fault of DLHR, the *DOT* occupational codes listed on the training outlines rarely describe the participants' precise job duties.

(c) Specific Vocational Preparation listings cannot be applied to JTPA participants

As was quoted above, the *DOT* Specific Vocational Preparation is the period required for "a typical worker" to learn how to perform a job. But the JTPA does not provide training to typical workers. The stated purpose of the Job Training Partnership Act is

> to establish programs to prepare youth and unskilled adults for entry into the labor force and to afford job training to those economically disadvantaged individuals and other individuals facing serious barriers to employment, who are in special need of such training to obtain productive employment.

29 U.S.C. 1501. DLHR described its Migrant and Seasonal Farmworker Program participants as "suffer[ing] chronic unemployment ... and low levels of education." (AF 137) The Response Team found that "[b]arriers of high unemployment with minimal vocational skills and low educational achievement remain dominant .... [M]ore than 60% of farmworkers have less than an eighth grade education." (DLHRX 13, at 1-2) Accordingly, by its very definition, the Specific Vocational Preparation does not apply to the workers who were receiving training through DLHR's Migrant and Seasonal Farmworker Program. For that reason alone, the Department's position in this case cannot be sustained.

(d) Grant Officer's Contentions

The Grant Officer is correct in contending that DLHR's explanation of how it determines the

duration of training is not always consistent. However, the Grant Officer has not charged DLHR with providing inconsistent explanations of how it calculates the duration of training. Rather, DLHR was accused of violating the JTPA simply because the period of OJT for occupational codes listed on the training outlines whose middle three digits are "687" exceeded the *DOT* Specific Vocational Preparation for those occupational codes of one month. DLHR is not required to produce evidence to rebut allegations with which it was not charged; and since it needed little, if any, evidence to defeat the Department's untenable case, DLHR significantly limited the evidence that it presented.

The Grant Officer also points out in his *Post-Hearing Brief* that in its December 15, 1995 response to the draft audit report, DLHR stated that "[a]lthough we use the DOT as the basis for our calculation of necessary hours for training in the different aspects of the farm, the numbers may vary from farm to farm depending on different factors." (AF 147). It is unclear how this single, general reference to the *DOT* by DLHR aids the Grant Officer's case. For it states that other factors in addition to the *DOT* went into determining the duration of training; and it does not state, or even imply, that DLHR considered the Specific Vocational Preparation for the single occupational code listed on each training outline as a limit on the duration of the OJT it provided. In fact, both Mr. Salgado and Ms. Harris knew that DLHR did not base its duration of training on the Specific Vocational Preparation listings for the occupational codes on the training outlines. Moreover, there is no indication that DOL considered this statement in determining that the duration of training in this case must be limited by the Specific Vocational Preparation listings. In fact, there is no indication that Ms. Harris or the Grant Officers were aware that DLHR had made this statement while they were preparing the initial and final determinations in this case.

3. Conclusion

In conclusion, the Grant Officer failed to present a prima facie case to support its contention that OJT in excess of the one month Specific Vocational Preparation period for the "687" occupations is a per se violation of the JTPA. The Grant Officer did not present any evidence that the OJT provided by DLHR was otherwise excessive or unnecessary. In any event, the *DOT* is not intended to be used to set judicial or legislative standards and may not contain applicable occupational codes; and the Specific Vocational Preparation listings, which are calculated for typical workers, cannot be applied to JTPA participants, who are disadvantaged, poorly educated and chronically unemployed.

For all of these reasons, the Grant Officer's disallowance of $732,232 in OJT costs was unreasonable and not supported by the JTPA or the applicable regulations, and is reversed.

ORDER

IT IS ORDERED that the Grant Officer's determination to disallow $732,232 in on-the-job training costs is reversed.

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JEFFREY TURECK
Administrative Law Judge